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U.S. Army Corps of Engineers, Portland District

ATTN: CENWP-OD-G (Judy Linton)

P.O. Box 2946

Portland, OR 97208-2946

judy.l.linton@usace.army.mil

Re: Scoping Comments on Regional General Permit for Chetco River Gravel Mining ACOE No. NWP-2008-00071

Dear Ms. Linton,

The Northwest Environmental Defense Center (NEDC), Oregon Shores Conservation Coalition, Klamath Siskiyou Wildlands Center, the Brookings Chapter of Northwest Steelheaders, and Barbara Ullian (jointly “Commenters”) submit these scoping comments regarding the U.S. Army Corps of Engineers’ (the Corps or ACOE) proposal to develop a regional general permit for gravel mining activities on the Chetco River in Curry County, Oregon (ACOE No. NWP-2008-00071). We look forward to reviewing the DEIS on this regional general permit concept, and intend to comment in detail at that time.

NEDC’s mission is to preserve and protect the environment and natural resources of the Pacific Northwest. Our membership includes individuals who live near and recreate in the vicinity of the Chetco River in Curry County, Oregon whose interests are harmed by historic, ongoing and proposed future gravel extraction activity in the Chetco River.

Oregon Shores is a signatory on behalf of its membership in Curry County, Oregon. Oregon Shores is a private, non-profit organization whose mission is to protect and conserve the natural resources of the Oregon Coast and aid residents in protecting their communities, lands and waters.

The Klamath Siskiyou Wildlands Center (“KS Wild”) is a non-profit public interest conservation organization based in Williams, Oregon and Ashland, Oregon. KS Wild's organizational mission is to conserve the globally outstanding biological diversity of the Klamath-Siskiyou and southern Cascade ecoregions in southern Oregon and northern California. KS Wild and its staff and members seek to protect the ecological

resources of the region by protecting and preserving the native habitat and hydrological health of public lands. KS Wild staff and members use and enjoy the national forests and watersheds within this ecoregion, including the Chetco River Watershed. Gravel mining operations degrade and conflict with the biological and hydrological values enjoyed by KS Wild staff and members.

The Brookings Chapter of Northwest Steelheaders is based in Brookings, Oregon, and seeks to protect fish and fish habitat in river systems throughout the Brookings region, including the Chetco River.

Barbara Ullian has been working to protect the Kalmiopsis Wilderness, surrounding unprotected wildlands and the area's nationally significant rivers since 1987.

A proposed regional general permit threatens to adversely impact the Chetco River and the fish and wildlife therein. The Corps is required to provide notice and opportunity for public hearings before issuing any type of permit, 33 U.S.C. §1344(a) & (e)(1), but by regulation the Corps has stated that normally there will be no public hearing unless the Corps believes that a hearing is needed to make a decision. 33 CFR § 327.4(a). The fact that the Corps has provided for a hearing in this matter indicates its desire for strong public input on this important issue. Please consider our comments, and please provide responses to our questions included below.

I. Adverse Environmental Impact of Gravel-Extraction Activities

Gravel extraction in streams poses serious threats to fish and their habitats. In the National Gravel Extraction Guidance issued by National Marine Fisheries Service (NMFS), NMFS identified potential gravel mining-related environmental impacts, including “direct harm to trust species; loss or degradation of spawning, rearing, resting, and staging habitat; migration delays and/or blockages; channel widening, shallowing, or ponding; loss of channel stability; loss of pool/riffle structure; increased turbidity and sediment transport; increased bank erosion and/or stream bed downcutting; and loss or degradation of riparian habitat.”

Gravel extraction has a direct impact on a stream's physical composition such as the channel geometry and bed elevation. Gravel substrate provides critical habitat for many fish species that is lost when the gravel is extracted from the stream. Gravel extraction also has a direct impact on water quality factors such as the stream depth, velocity, turbidity, sediment transport, stream discharge, and temperature. These changes in water quality adversely impact fish species by altering individual behavior, migration, and spawning activities. A variety of other impacts on fish include impeding feeding, degrading salmonid redds, and disturbing food sources.

In-stream gravel mining has a significant adverse impact on all species that rely on the affected waterway. These impacts are apparent through reduced fish populations, species displacement, and shifts in population distributions. These impacts are further exacerbated in flow-limited riverine systems such as the Chetco River. The Chetco River

system does not have snowpack to augment flow, and is thus very susceptible to weather-related fluctuations and man-made disturbances.

Question 1: How does the Corps plan to incorporate the guidance that NMFS has provided on the subject of gravel extraction into its proposed Regional General Permit?

II. The Corps' use of a single general permit rather than narrowly tailored site-specific individual permits is inappropriate in this instance

Corps regulations provide that the use of general rather than individual permitting is to be constrained to activities that “cause only minimal individual and cumulative environmental impacts.” 33 CFR § 323.2(h)(1). Corps regulations also indicate that the aim of a general permit is to avoid unnecessary duplication of regulatory control exercised by another federal, state, or local agency. 33 CFR § 323.2(h)(2). There are a number of agencies with jurisdiction over gravel extraction activities and the permitting process can involve input from a variety of agency administrators. The aim of the CWA is to protect to the greatest extent possible, the waters of the United States. Section 101 of the Act sets forth a national goal that the discharge of pollutants into the navigable waterways of the United States be completely eliminated by 1985, and an interim goal toward achieving this overall objective was that all waterways be fishable and swimmable by 1983. 33 U.S.C. § 1251. Nowhere in the Act is the goal of efficiency set forth.

The goals stated above have never been repealed, replaced or amended. Every application for a new Section 404 permit gives the Corps the opportunity to look at the nature of the applicant's facility, the quality of the water and the beneficial uses unique to the proposed facility location, and the potential impact that the individual applicant's project would have on Oregon's waterways. Commenters are concerned that instead of working toward these goals, the Corps is instead prioritizing efficiency and convenience by pushing for a regional general permit that will only perpetuate the status quo of water quality problems in Oregon, rather than further the goals of the CWA.

For a dramatically invasive procedure like in-stream gravel extraction, individual permits provide site-specific analysis, mitigation measures, best management practices and site-specific remediation requirements that a Regional General Permit (RGP) program is unable to provide. Pursuant to ACOE regulations, individual permits are issued “following a review of individual applications” whereas general permits “authorize a category or categories of activities in specific geographical regions,” clearly envisioning a less thorough review of proposed extraction activities. 33 CFR 320.1(c) (2007).

The regulations also indicate that, “[i]f an activity is covered by a general permit, an application for a [Corps] permit does not have to be made. In such cases, a person

must only comply with the conditions contained in the general permit to satisfy requirements of law for a [Corps] permit.” 33 CFR 320.1(c) (2007).

Question 2: Specifically where in the administrative record supporting this proposed permitting decision does the Corps demonstrate that gravel mining in the Chetco River causes “only minimal individual and cumulative impacts”?

Question 3: Will the state be issuing the RGP instead of the ACOE? If so, under what authority will the state be issuing the RGP?

Question 4: For each of the previous 10 years, how much aggregate in tons per year has been extracted from the Chetco River? Precisely how much more or less aggregate removal in tons per year will the proposed RGP authorize?

Question 5: Since RGPs contain general provisions intended to protect the environment, including natural and cultural resources, will the conditions set forth in the general permit be stringent enough to cover all sites along the Chetco River?

The ACOE regulations also note, “in certain cases pre-notification may be required before initiating construction.” 33 CFR 320.1(c) (2007).

Questions 6: Will pre-construction notification be required in the proposed regional general permitting scheme? What will the terms of the pre-construction notification be?

General permits are adopted after notice and comment and are good for up to five years.

Question 7: Does ACOE intend this RGP to be a short-term program, or would it seek to renew the RGP in 5 years?

Question 8: Will another EIS be completed upon renewal?

Question 9: How will ACOE ensure the long-term protection of the Chetco River under the program? Will the Corps impose upon each applicant project area-specific requirements for restoring the applicant’s project site to its pre-construction condition? What specific long-term protection measures has the ACOE contemplated in connection with the proposed RGP?

Question 10: Will the Corps modify the terms of the RGP upon renewal? Specifically, will the standards increase in stringency?

III. Under the National Environmental Policy Act, the Corps must complete an Environmental Impact Statement

Under the National Environmental Policy Act (NEPA), “all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environmental, a detailed statement . . . on the environmental impact of the proposed action.” 42 U.S.C. § 4332(2)(C)(i). The proposed regional general permit constitutes a major federal action. A major federal action includes “actions with effects that may be major and which are potentially subject to federal control and responsibility.” 40 CFR § 1598.18 . This includes “new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. 40 CFR § 1598.18(a) . Federal actions include agency approval of “specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.” 40 CFR § 1598.18(b)(4) .

The proposed RGP program is subject to the review, approval and conditions established by ACOE. The project is a construction and management activity located within the waters of the U.S., and requires the specific approval of ACOE. A regional general permit clearly satisfies the definition of major federal action set forth above, and therefore an Environmental Impact Statement (EIS) is required under law pursuant to NEPA.

Any federal action where significant environmental impacts are present requires the action agency to prepare an EIS. In preparing an EIS, the agency must analyze alternative actions and present mitigation strategies in order to lessen the environmental impact of a proposed federal action. An Environmental Assessment (EA), on the other hand, applies to actions where it is not obvious that significant environmental impact will result. An EA will not be sufficient for devising a regional general permit as the Corps has proposed. While ACOE’s regulations provide that “[m]ost permits will normally require only an EA” (33 CFR § 230.7) , the regional scope of this proposed general permit program requires a comprehensive analysis, beyond that needed for an EA under NEPA. An agency undertakes an EA in order to assess *whether* the proposed project will have substantial environmental impact. Gravel extraction is known to have significant adverse environmental impacts on river systems, and the Corps must complete an EIS in connection with the RGP. An EIS involves a much more in depth analysis than does an EA, and is necessary in this instance in order to assess the potential cumulative environmental impacts of a regional permitting approach, as well as possible alternative actions.

The Chetco River is already impaired under a number of parameters, and additional constraints will only further degrade the river’s water quality. The National Marine Fisheries Service has previously determined that specific proposals to remove aggregate from specific sections of the Chetco River had the potential to adversely affect critical habitat for listed species. The cumulative impacts of this proposed regional permit

program are uncertain but are likely to be significant given the current state of the Chetco River. NEPA requires that a cumulative analysis provide some “qualified or detailed information.” *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998). Cumulative impact is the impact on the environment, which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 CFR § 1598.8 (2007). Effects and impacts as used in these regulations are synonymous. Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. 40 CFR § 1598.8 (2007). “The NEPA document must analyze the combined effects of the actions in sufficient detail to be useful to the decision-maker in deciding whether, or how, to alter the program to lessen the cumulative impacts.” *Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997).

Any analysis under NEPA should consider the direct and indirect impacts of the proposed project. 40 CFR §1508.8 . The proposed regional general permit will potentially have significant direct and indirect impacts on the health of the Chetco River, and the species the Chetco River supports. A detailed Environmental Impact Study is the only way to appropriately assess the proposed permitting program given the activities to be permitted and the geographical scope of the permit.

Question 11: What is the Corps’ proposed timeline for drafting an EIS in advance of finalizing this proposed regional general permit?

IV. General permit conditions are inadequate to address water quality issues along the Chetco River

Under Section 401(a) of the CWA, any applicant for an ACOE permit in Oregon must obtain a certification from Oregon Department of Environmental Quality (DEQ) stating that the discharge from the proposed project will comply with several requirements of the CWA, most notably the water quality standards requirement under § 303. Water quality standards include three elements: (1) one or more designated “uses” of a waterway; (2) numeric and narrative “criteria” specifying the water quality conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses; and (3) an antidegradation policy that ensures that uses dating to 1975 are protected and high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Compliance with water quality standards requires protection of all three components of water quality standards. *See PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 719, 730–31 (1994).

It is the public policy of the state of Oregon to protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses. ORS 468B.015(2). Oregon's water quality standards specifically require the protection of beneficial uses. The beneficial uses for estuaries and main waters located in the South Coast Basin set forth under OAR 340-04-0300 (Table 300A), include those suited to fish and aquatic life, wildlife and hunting and fishing.

The Chetco River watershed has been damaged by high erosion and high runoff soil types both in the upper and lower portions of the watershed. In the upper watershed, rapid runoff and exposed serpentine in the inner gorge have impacted water quality and hydrology in the Chetco River. The water temperature varies dramatically along different stretches of the river from very cold in wilderness areas to turbid and warm through more developed areas. Steelhead and cutthroat trout use the entire watershed. Chinook primarily use the lower mainstem channels and Coho travel higher in the watershed.

The lower stretches of the Chetco River are already listed pursuant to Section 303(d) of the CWA as water quality limited for Temperature, Flow Modification and Habitat Modification with potential concern for the parameter of Alkalinity. The above listed parameters impair the following beneficial uses in the Chetco River: Water Supply (Public, Private, Industrial); Livestock Watering; Irrigation; Fish and Aquatic Life (Anadromous Fish Passage; Salmon and Steelhead Spawning; Salmon and Trout Rearing and Migration; Resident Fish and Aquatic Life; Cold-Water Aquatic Life); Wildlife and Hunting; Fishing; Boating; Water Contact Recreation; Aesthetic Quality; Hydropower; and Commercial Navigation & Transportation. See Oregon DEQ's 401 Water Quality Certification issued to Freeman Rock, Inc., August 24, 2007.

The Chetco estuary has already been substantially altered from its natural state. Heavy development and increased in-water activity along the lower Chetco has resulted in peak flow enhancement, sediment inputs, riparian vegetation removal and water contamination. Without substantial protections, any ongoing and additional gravel-mining operations on the Chetco River will only further degrade the water quality.

We look forward to detailed parameter-specific analysis in support of the agency's conclusion that activities authorized under this proposed regional permit will not exacerbate the Chetco River's water-quality limited status for Temperature, Flow Modification and Habitat Modification. We also will be interested to see how the agency will deal with water quality concerns related to Alkalinity.

Question 12: How will the Army Corps' RGP ensure that Oregon water quality standards are protected? What conditions will the ACOE include in the proposed RGP in order to prevent further degradation of the Chetco for each of the following parameters: Temperature, Flow Modification, Habitat Modification and Alkalinity?

Question 13: Would the scope of the Corps' proposed RGP be based on a regional or a watershed-specific approach?

Question 14: Specifically how will the Corps insure that each of the above listed beneficial uses of the Chetco River is protected?

V. Federal Consistency Requirements

Under NOAA regulations, any federal permit activity must be consistent with the objectives or purposes of the Coastal Zone Management Act (CZMA). A federal permitting activity will be consistent with the Act if it satisfies each of three requirements. First, the activity must further the national interest as articulated in Section 302 or Section 303 of the Act, in a significant or substantial manner. Second, the national interest furthered by the activity must outweigh the activity's adverse coastal effects, when those effects are considered separately or cumulatively. And finally, the agency must find that no reasonable alternative is available, which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. 15 CFR § 930.121. Section 302 of the Act identifies Congress's findings regarding the particular demands placed on the nation's coastal zones, and vulnerability of the habitat areas of the coastal zone, and the fish, shellfish and wildlife therein to destruction by man's alterations. 16 U.S.C. § 1451. In section 303 of the Act, Congress declared it a national policy to preserve, protect, develop and where possible to restore and enhance the resources of the Nation's coastal zone through the implementation of state management plans. 16 U.S.C. § 1452.

Question 15: Does the proposed permitting action further the national interests articulated in Section 302 and 303 of the CZMA? If not, specifically how do the benefits of the activity outweigh the adverse effects on Oregon's sensitive coastal region?

Under the Act, the Oregon Department of Land Conservation and Development (DLCD) must review various federal actions in or affecting Oregon's coastal zone for consistency with the Coastal Management Program. The federal consistency provisions of the CZMA require that any federal action occurring in or outside of Oregon's coastal zone that affects coastal land or water uses or natural resources must be consistent with the Oregon Coastal Management Program (OCMP). A project must be shown to be consistent with the various applicable components of the OCMP, that is, with the statewide planning goals, with coastal city and county comprehensive plans and land use regulations approved by the Land Conservation and Development Commission, and with various state agency authorities. OAR 660-035-0020.

Question 16: Has the Corps identified each of the local land use regulations that would be implicated by a regional general gravel-mining permit for the Chetco River? If so, please enumerate the land use regulations implicated.

How will the conditions set forth in the Corps' RGP ensure consistency with each of the local land use regulations?

Oregon DLCD is responsible for reviewing, commenting on and concurring with or objecting to consistency certifications for federal permits proposed by the Corps. Oregon DLCD is also responsible for securing necessary review and comment from other State, regional, and local government agencies, and, where applicable, the public. Thereafter, only Oregon DLCD is authorized to comment officially on, concur with, or object to a federal consistency determination. 15 CFR § 930.6(b). Oregon DLCD assists agencies on a case-by-case basis with determining how to best go about demonstrating consistency with the OCMP.

Oregon's Coastal Management Program promotes the restoration and protection of coastal waters from the cumulative adverse impacts of certain land and water activities, including hydro-modification, which may result from certain gravel extraction processes. OCMP specifically focuses on activities that affect water quality in Oregon's coastal zone that, by increasing temperature, changing pH, or reducing dissolved oxygen, diminish the resilience of natural systems by removing vegetation or channelizing streams.

Question 17: How will the Oregon DLCD be involved in the issuance of the regional general permits under the Corps' proposed permitting scheme?

Under CZMA regulations, 15 CFR § 930.2, state management programs shall provide an opportunity for public participation in the State agency's review of a federal agency's consistency determination.

Question 18: Will the Oregon DLCD provide notice and an opportunity for public comment for each proposed general permit under the Corps' regional general permitting program?

VI. Oregon Department of State Lands requirements

Oregon's Removal-Fill Law (ORS 196.795–ORS 196.990) requires individuals who plan to remove or fill material in waters of the state to obtain a permit from the Oregon Department of State Lands (DSL). The purpose of the law is to protect public navigation, fishery and recreational uses of the Oregon's waterways.

Permits are required for projects involving the removal or fill of 50 cubic yards or more of material in Oregon waterway and for the removal or fill of any material regardless of the number of cubic yards affected in a stream designated as essential salmon habitat. The lower Chetco River is designated essential salmon habitat and all in-water activities along the Chetco will therefore be subject to a DSL permit no matter the size of an applicant's operation.

All DSL permits include standard and special design and operating conditions that are intended to ensure the protection, conservation and best use of Oregon's water resources and prevent harm to fishery and recreational uses of the waters. One condition is that the project be conducted during the "in-water work period" established by the Oregon Department of Fish & Wildlife (ODFW) district fish biologists' recommendations. ODFW gives primary consideration to important fish species including anadromous and other game fish and threatened, endangered, or sensitive species. Time periods were established to avoid the vulnerable life stages of these fish including migration, spawning and rearing. ODFW has recommended an in-water work period for the Chetco River Estuary from October 1 to May 31 and a work period from July 15 to September 30 for the Chetco River.

Question 19: Will the Corps RGP hold applicants to ODFW in-water work period requirements?

Gravel extraction projects will require a DSL removal-fill permit and a federal Section 404 permit from ACOE. Currently, DSL and the Corps use a joint permit application form, so applicants only need to fill out one application to obtain both permits. However, applicants must send a copy of the application to both agencies. Each agency reviews the form and issues separate permits that may have different requirements.

Question 20: How will the RGP alter the current review procedures for DSL and the Corps?

Question 21: How exactly will the proposed RGP impact the processes involving other consulting state and federal agencies that participate in overseeing the issuance gravel-extraction permits in Oregon?

VII. Endangered Species Act requirements

Coho Salmon—Final Determination as Threatened

On February 11, 2008, NOAA issued its final determination for the Oregon Coast Coho Salmon as a threatened species under the ESA. 73 Fed. Reg. 7816 (Feb. 11, 2008). The regulations went into effect on May 12, 2008. Coho Salmon were listed as threatened due to serious degradation of "critical habitat" and encroaching human activities. Gravel mining was listed as the second example of human activities that have adversely impacted habitat and salmon populations. The continued degradation of "critical habitat" and encroachment of human activities such as gravel mining threaten the survival of the species. The Corps should recognize the urgency and importance of the recent determination of Coho salmon as "threatened" by adopting stringent standards to protect Coho salmon. Commenters are concerned that a streamlined regional permit will likely increase gravel mining projects conducted with fewer considerations for localized impacts on Coho Salmon in designated critical habitat in the Chetco River.

Question 22: What measures will be utilized to ensure the most protective steps are taken to prevent the continued degradation of Coho salmon habitat by a regional general permitting scheme?

Question 23: What groundfish, coastal pelagic and pacific salmonid species have the potential to be affected by extraction activity authorized under this proposed RGP, and what specific measures will be required to insure the protection of each of these species?

Question 24: Will the proposed RGP authorize activities in the Chetco River estuary? If so, how do the estuary-specific needs of protected species differ from habitat requirements further up into the watershed?

Question 25: Might extraction activities under the proposed RGP result in increases in stream width or depth? If so, how will those increases affect listed species?

Question 26: How will extraction activities authorized under the proposed RGP influence macroinvertebrate production along various stretches of the Chetco, and how will the agency insure that such macroinvertebrate production influences will not adversely affect listed species?

Question 27: Specifically how might activities authorized under the proposed RGP lead to loss of riparian vegetation, and how will the agency insure that such loss does not adversely affect listed species?

Question 28: Has a science-based gravel recruitment budget been completed for the Chetco River similar to the CHERT (County of Humboldt Extractive Resources Team) process in northern California? Absent such a science-based determination to consider the cumulative impacts of extraction activities at multiple sites, how will the Corps insure that this proposed general permit protects the varied habitat needs of listed species?

The purpose of the ESA is to enable a conservation program for endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ecosystems vital to the survival of endangered or threatened species are designated as “critical habitats.” 16 U.S.C. § 1533(a)(3). Any significant alteration or destruction of “critical habitat” is an unlawful “harm” to the species. “Harm” includes significant alteration or destruction of the habitat of listed species. Actions that change or degrade the habitat may lead to injury or death of species by “significantly impairing essential behavior patterns, including breeding, spawning, rearing, migrating, feeding, and sheltering.” 50 CFR § 222.102 (2007). These “harms” to the species are unlawful because they are a prohibited “take” of the species.

The ESA provides exceptions to prohibited “takes” when they are “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Incidental take permits require applicants to submit a conservation plan that can prove the taking will not “appreciably reduce the likelihood of survival and recovery of the species in the wild.” 16 U.S.C. § 1539(a)(2)(B).

An action of a federal agency that may affect a listed species or their critical habitat requires a consultation with NMFS Fisheries. 16 U.S.C. § 1536(a)(2). If NMFS determines that the agency’s action will jeopardize the species or adversely modify the critical habitat, NMFS must suggest alternatives that will not violate 16 U.S.C. § 1536(a)(2). If this is not possible, NMFS may provide a “take” exemption specifying actions to minimize impacts. NMFS issues a Biological Opinion that provides the analyses required under the ESA.

In 2007, NMFS issued a Biological Opinion concerning proposed gravel mining projects on the Chetco River (Chetco BO). The Biological Opinion analysis was dependent upon factors localized to a very small scale, specifically focusing on the Freeman and Tidewater facilities. The analysis broke the Freeman and Tidewater projects’ impacts into three different reaches that were separated by only a few miles. Within these small subdivisions of the Chetco, NMFS found differences in habitat conditions and salmon populations that were significant enough to warrant different conclusions about the proposed projects’ impacts. These differences were found in only a few miles of the Chetco, so even more variation will be found throughout the entire length of the Chetco. These variations will also require separate analyses and different conclusions about the protective measures adapted specifically to the localized habitat. Commenters are concerned that a regional general permit will ignore the variations in habitat conditions that exist throughout the river. Without adequate analyses of the habitat conditions in question it will be difficult to determine what appropriate protective measures need to be taken to ensure the survival of threatened Coho Salmon.

Question 29: How will the Army Corps account for localized variations in habitat characteristics and Coho salmon populations in a general permit for the entire Chetco River?

NMFS determined that the gravel mining projects were reasonably certain to have the following effects: “slowing recovery of stream geomorphology; increased suspended sediment; increased summer stream temperature; chemical contamination; and in-water equipment operation including a temporary bridge.” (Chetco BO, p. 12.) NMFS determined that these impacts will have significant effects on the threatened Coho species that include slowing the recovery of the already degraded habitat and forcing the salmon to migrate to less disturbed habitats. Commenters are concerned that these significant effects seriously threaten the survival of the Coho salmon population in light of the recent final determination of Coho salmon as a “threatened” species under the ESA.

One example of the variations in localized habitat and population conditions is apparent in NMFS’s analysis of the suspended sediment in the river. NMFS concluded

that the gravel mining projects will increase suspended sediment in the water. The increased suspended sediment would lead to behavioral changes and lower growth levels in juvenile salmon. (Chetco BO, p. 17.) For this proposed project the agency determined that the impacts of increased suspended sediment would be limited partially due to the timing of increased sediment plumes in comparison to the local population's migration patterns. Migration patterns will vary throughout the river so the timing of sediment plumes approved in a regional permit may not coincide with the localized migration patterns. Another reason that the increased suspended sediment would not meaningfully change the Coho salmon populations was the close proximity of unimpacted habitat. Close proximity to unimpacted habitat may not be available in all reaches throughout the river, which could lead to a meaningful change in the Coho salmon populations. These variations in the localized characteristics of the Coho salmon population and habitat conditions require consideration in the analysis of the impact of suspended sediment. Commenters are concerned that a general gravel-mining permit will allow projects to meaningfully impact the Coho salmon populations and the critical habitat in the Chetco.

Question 30: How would a regional permit address the impact of a specific project's timing of increased suspended sediment times on the site-specific migration patterns of threatened species?

This is only one example of the multiple effects upon the critical habitat and threatened species. The Chetco BO found that there will be other adverse impacts from the proposed action that will result in the death or injury of certain salmon.

The ESA also requires an incidental take statement when actions will result in harm to critical habitat and/or the injury or death of individual species. An incidental take statement was included in the Chetco BO for the proposed gravel mining projects. In order to determine the extent of incidental takings of the Coho salmon, NMFS had to apply the specific impacts of the proposed actions to the individual habitats and species characteristics of the Chetco River. The best indicator of the extent of the take is measured by the impacts from the increase in suspended sediment. The impact on the Coho salmon resulting from the increase in suspended sediment was determined based upon highly localized factors previously mentioned. Therefore, the extent of incidental takings of Coho salmon will depend upon the local habitat conditions and population levels. Commenters are concerned that a regional general permit cannot accurately determine the extent of the incidental takings based upon a regionalized permit for the entire Chetco River. In the absence of an accurate incidental take statement, any adverse impact to the critical habitat or harm to the Coho salmon is illegal.

Question 31: In the absence of individual permit analyses, how will the Corps issue incidental take statements pursuant to the ESA that account for the difference in takes from each permitted project?

The incidental take statement also requires that reasonable and prudent measures be taken to avoid or minimize the incidental take of Coho salmon. These measures need to be highly specialized to the localized conditions and should not be made on a regional

level. In the absence of reasonable and prudent measures, the protective coverage of the incidental take statement lapses and the gravel mining project will be in violation of the ESA for adverse effects to the critical habitat or harm to the Coho salmon.

Question 32: How does the Corps plan to address what reasonable and prudent measures are appropriate for each proposed gravel mining project on a regional level?

Similarly, terms and conditions must be specified to the individual permits to ensure the reasonable and prudent measures are followed that include specific applications to the individual location and project. For example, the Chetco BO includes that the upstream third of the bar is protected from excavation activities. This highly specialized term is unlikely to be accounted for in a regionalized permit.

Question 33: How does the Corps plan to implement terms and conditions specialized for each gravel-mining project without individual consideration of the impact from each project?

VIII. Magnuson-Stevens Fishery and Conservation Management Act requirements

When the geographic locations of Essential Fish Habitat (EFH) and critical habitat overlap, the individual consultation requirements under the ESA and the Magnuson-Stevens Act both apply. In these circumstances, NMFS will generally merge the consultations into one response package, whenever possible, to maximize efficiency.

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) was enacted for the conservation and management of domestic fisheries. 16 U.S.C. § 1801(b) (2000). 1996 Amendments to the MSA recognized the need for protection of fish habitat to promote sustainable fisheries and established requirements to label areas necessary for fish survival as EFH into the act. 16 U.S.C. § 1802(10) (2000).

Section 305(b) of the MSA requires a Federal agency to consult with NMFS when they engage in actions likely to adversely impact EFH. Adverse impacts that require consultation include “the direct or indirect physical, chemical or biological alterations of the waters or ecosystem components, if such modifications reduce the quality or quantity of EFH.” NMFS is then required to recommend practices to conserve EFH.

The Chetco River is designated as EFH. 72 Fed. Reg. 19862 (April 20, 2007). An analysis for an EFH must account for fish species beyond threatened or endangered species under the ESA. Commenters are concerned that a regional general permit will ignore the variety of fish species and their populations throughout the river. An RGP that generalizes impacts for an entire river is not likely to contemplate particularly sensitive areas of the river. In the absence of these considerations for all fish species, the proposed

RGP program will not comply with the Magnuson-Stevens Fishery and Conservation Management Act.

Question 34: How does the Army Corps plan to analyze the impacts to EFH for all fish species with designated EFH throughout the river?

Conclusion

A regional general permit for gravel extraction activities cannot adequately address environmental characteristics and fish and wildlife populations unique to each river mile of the Chetco. Without sufficient consideration of significant adverse environmental impacts, a regional general permit has the potential to dramatically undercut important protections afforded to the Chetco River under applicable law. Commenters strongly encourage the Corps to maintain an individualized permitting program for gravel extraction activities on the Chetco to ensure thorough review of each site-specific permit application by all involved agencies.

Sincerely,

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